

# Chapter 1

## Justice Delayed: Absent Recognitors and the Angevin Legal Reforms, c. 1200

Will Eves

The legal reforms of Henry II's reign laid many of the foundations of the English common law. Royal control over criminal pleas was increased. Likewise, a number of actions were created which allowed disputes concerning land, which might previously have been heard in lords' courts, to be brought directly before royal justices. These actions, known as 'assizes', proved to be extremely popular, a fact illustrated by the large number of cases found in the earliest surviving plea rolls of the royal courts.<sup>1</sup> The procedures followed by each type of assize could differ somewhat, although a common feature was the mode of proof used to decide the case. This was the 'recognition'.<sup>2</sup> Twelve local landholders were empanelled as 'recognitors' to provide a formal answer, on oath, to a question of fact. Recognitions nevertheless differed from a modern jury as

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<sup>1</sup> See generally Paul Brand, "'Multis Vigiliis Excogitatum et Inventum': Henry II and the Creation of the English Common Law", in Brand, *MCL*, 77-102. See also S.F.C. Milsom, *The Legal Framework of English Feudalism* (Cambridge: Cambridge University Press, 1976); Joseph Biancalana, 'For Want of Justice: Legal Reforms of Henry II', *Columbia Law Review* 88 (1988): 433-536; and John Hudson, *The Formation of the English Common Law: Law and Society in England from the Norman Conquest to Magna Carta* (New York: Routledge, 2016; London: Longman, 1996). I am grateful to Professor John Hudson for comments on an earlier draft of this chapter, and to Professors Paul Brand and William Ian Miller for discussions on the subject at various intervals over the past few years.

<sup>2</sup> See generally R.C. van Caenegem, *Royal Writs in England From the Conquest to Glanvill*, SS 77 (London: B. Quaritch, 1959), 51-103.

the recognitors were asked to swear, at least ostensibly, on what they knew to be true, rather than what they judged to be true after weighing the evidence presented to them.<sup>3</sup>

Although central to the new Angevin procedures, the recognition was not an invention of Henry II's reign. Carolingian royal inquests had relied on the testimony of jurors.<sup>4</sup> Likewise, we have records of Anglo-Saxon disputes which were resolved through sworn neighbourhood testimony.<sup>5</sup> The verdict of groups of neighbours as to a person's *fama* could also be used as proof in a range of Romano-canonical procedures.<sup>6</sup> Nevertheless, as Susan Reynolds has observed, the Angevin reformers built on these procedures and gave recognitions 'precise form and rules of application' in the English royal courts.<sup>7</sup>

F.W. Maitland commented that the recognition 'suited Englishmen well; it became a cherished institution and was connected in their minds with all those liberties that they held dear'.<sup>8</sup> Indeed, no juridical concept has found more widespread and vocal exaltation in the traditionally sombre confines of Anglo-American jurisprudence. Famously described by Lord Devlin as 'the lamp that shows that freedom lives', collective judgment is seen by many as the palladium of liberty.<sup>9</sup>

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<sup>3</sup> This distinction must often have been difficult to maintain in practice and the recognitors may well have investigated the facts behind the dispute before they appeared in court. See P&M, 2: 624-625.

<sup>4</sup> Heinrich Brunner, *Die Entstehung der Schwurgerichte*, summarised in R.C. van Caenegem, *The Birth of the Common Law*, 2nd ed. (Cambridge: Cambridge University Press, 1988), 73-76.

<sup>5</sup> van Caenegem, *Writs*, 69-71.

<sup>6</sup> Mike McNair, 'Vicinage and the Antecedents of the Jury', *LHR* 17 (1999): 537-590, at 571-578.

<sup>7</sup> Susan Reynolds, *Kingdoms and Communities in Western Europe, 900-1300*, 2nd ed. (Oxford: Oxford University Press, 1997), 33-34.

<sup>8</sup> P&M, 2: 632.

<sup>9</sup> Patrick Devlin, *Trial by Jury*, The Hamlyn Lectures, 8th Series (London: Stevens and Sons, 1956), 164. Also note William Blackstone, *Commentaries on the Laws of England, A Facsimile of the First Edition of 1765-1769* (Chicago and London: University of Chicago Press, 1979), 4: 343. See also C.T. Coleman, 'Origin and Development of Trial by Jury', *Virginian Law Review* 6 (1919), 77-86.

Despite the importance of the recognition in the early common law, the study of ‘civil’ recognitions in the late twelfth and early thirteenth centuries has been somewhat neglected, with most scholarly attention focussing on the later medieval criminal jury.<sup>10</sup> The works that have considered the recognition have generally fallen into two categories. A number of historians have investigated the earlier history of juries in the Middle Ages, and have attempted to pinpoint the origins of the English procedure.<sup>11</sup> Others have considered the influence of the recognition on the socio-political development of the medieval state.<sup>12</sup> The conduct of the recognitors themselves has thus been somewhat overlooked. However, discussion on this topic has recently been reinvigorated by Paul Brand’s re-examination of the ‘Millon thesis’, an argument put forward by David Millon in 1989 which suggested that recognitors in the late medieval and early modern periods eschewed legal norms and frequently used their discretion to decide cases.<sup>13</sup>

This chapter examines another aspect of the conduct of recognitors in civil cases. It investigates the extent to which the absence of recognitors from court affected the administration of justice in the earliest years of the common law. Many of the new Angevin procedures were designed to provide swift justice. It will be seen, however, that a significant number of actions suffered postponements because insufficient

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<sup>10</sup> A summary of the relevant literature is provided in James Masschaele, *Jury, State, and Society in Medieval England* (New York: Palgrave MacMillan, 2008), 7-8. Note also the discussion in the preface of *‘The Dearest Birth Right of the People of England’: The Jury in the History of the Common Law*, eds. John W. Cairns and Grant McLeod (Oxford: Hart Publishing, 2002), v-ix. See in particular Green, *Verdict*.

<sup>11</sup> See Masschaele, *Jury, State, and Society*, 15-44; McNair, ‘Vicinage’; van Caenegem, *Writs*, 57-86; and Doris M. Stenton, *English Justice between the Norman Conquest and the Great Charter, 1066-1215* (London: George Allen & Unwin Ltd, 1965), 13-17.

<sup>12</sup> See A.B. White, *Self-Government at the King’s Command: A Study in the Beginnings of English Democracy* (Minneapolis: University of Minnesota, 1933) and Masschaele, *Jury, State, and Society*.

<sup>13</sup> David Millon, ‘Positivism in the Historiography of the Common Law’, *Wisconsin Law Review* 1989 (1989): 669-714; Paul Brand, ‘Judges and Juries in Civil Litigation in Later Medieval England: The Millon Thesis Reconsidered’, *JLH* 37 (2016): 1-40.

recognitors turned up on the day of the hearing. Actions heard at the Bench, which commonly sat at Westminster, were particularly susceptible to these delays. Cases brought before the court which travelled with the king, known as the court *coram rege*, were also frequently affected. In contrast, actions heard locally by the justices of eyre were less likely to be affected by recognitor absences.

The first part of this chapter outlines the background to the Angevin reforms and illustrates why swift justice may have been of such concern to the reformers. The new Angevin procedures are then examined. Particular attention is given to the procedural rules which were introduced to ensure that cases proceeded to judgment without undue delay. We then turn to the surviving plea rolls of the royal courts to examine the impact of recognitor absences on these new actions. We begin our survey in 1194, the date of the earliest surviving plea rolls.<sup>14</sup> The period up to c. 1208 is considered. This provides a good selection of plea rolls and allows us to end our survey before the activity of the royal courts was disrupted in the tumultuous later years of John's reign.<sup>15</sup>

## **The Background to the Angevin Legal Reforms**

In order to understand the context of the Angevin reforms, it is helpful to consider the nature of English justice in the early years of the twelfth century. A writ of Henry I provides us with an outline, perhaps somewhat idealised, of the court structure in operation in England following the Conquest. Disputes concerning right to land were to be heard in the court of the lord of the fee in which the land in dispute was located. If

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<sup>14</sup> It is likely that plea rolls were made by the royal courts before 1194, although none have survived. See Brand, 'Multis Vigiliis', 95.

<sup>15</sup> See Stenton, *English Justice*, 101-114.

the jurisdiction of the lord's court was unsuitable, most likely because the litigants claimed to hold the land in dispute of different lords, the case would be heard in the county courts. Disputes between tenants-in-chief would be heard by the king himself, acting in his capacity as immediate lord of the litigants.<sup>16</sup> It was also possible for other well-placed individuals to call upon the king to hear their cases, although such royal intervention occurred on an *ad hoc*, rather than structured, basis.<sup>17</sup> In any of the above courts, proof might take various forms, including the use of documents and sworn testimony. When cases could not be resolved through other means, the matter was often decided through trial by battle.<sup>18</sup>

Regardless of the type of court before which the dispute was brought, the path to justice could be slow and frustrating. Richard de Anstey's case against his cousin, Mabel de Francheville, provides a well-known instance of a case beset by delays in both the secular and ecclesiastical courts.<sup>19</sup> Richard brought the case before the king's court in 1158. The first hearing was scheduled to take place at Northampton, so Richard travelled to court with his friends and helpers. However, the matter was postponed and a day was given for a subsequent hearing at Southampton. As Richard alleged that Mabel was illegitimate, the dispute was then transferred to the archbishop of Canterbury's court. The case was then subject to many delays, and both parties made appeals to Rome. Richard, in his appeal, criticised Mabel's 'shiftiness' and made it clear that 'he was aggrieved by the fact that he had now been troubled by a series of postponements

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<sup>16</sup> 'Charter of Henry I concerning the holding of courts shire and hundred (26 July 1108 – August 1111', in *EHD*, 2: no. 43, at 474-475.

<sup>17</sup> Hudson, *Formation*, 27-29.

<sup>18</sup> *Ibid.*, 111.

<sup>19</sup> *Lawsuits*, 2: no. 408, at 395.

for more than two years and had been cheated of his just claim'.<sup>20</sup> Mabel was eventually judged to be illegitimate and the case then returned to the secular courts. The justiciar gave Richard a day for pleading at London in the beginning of March 1163. However, the case was postponed on numerous occasions and it eventually came before the king in July 1163. 'At last,' Richard wrote, 'by the grace of God and of the king, and by judgment of his court, my uncle's land was adjudged to me'.<sup>21</sup> The case had cost him £344, 7s, 4d.<sup>22</sup>

Richard de Anstey's case suffered delays in both the secular and ecclesiastical courts. Nevertheless, cases which did not require an intervening ecclesiastical hearing might also suffer long postponements. In the early years of Henry II's reign, for example, Turstin fitz Simon was summoned to the county court to answer a complaint brought by the abbot of Abingdon. The abbot alleged that Turstin had unjustly obtained possession of the church of Marcham and other hereditary possessions.<sup>23</sup> The Abingdon chronicler tells us that Turstin, 'conscious of his misdeed, cleverly evaded the meetings of the county for two years and more ... under pretext of the king's service or illness or some other cause'.<sup>24</sup> The abbot met the king at Woodstock in 1157 and 'strenuously begged him to have mercy and put an end to his pain and the case'.<sup>25</sup> Turstin was subsequently summoned to the king's court and, at last, the abbot was able to obtain justice.

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<sup>20</sup> Ibid., no. 408, at 395.

<sup>21</sup> Ibid., no. 408, at 402.

<sup>22</sup> Ibid., no. 408, at 404.

<sup>23</sup> Ibid., no. 363, at 325-327.

<sup>24</sup> Ibid., no. 363, at 326.

<sup>25</sup> Ibid., no. 363, at 326.

A case between Battle Abbey and Gilbert de Balliol, probably from the following year, proceeded in a similar manner. The dispute concerned land which had been granted to the Abbey by Gilbert's predecessor, and which Gilbert had then taken back into his own hands.<sup>26</sup> We are told that, once the abbot had managed to become a friend of the king, he obtained a royal writ ordering the case to be heard in the court of John, Count of Eu. Gilbert did not appear, despite many summonses, and is said to have made all manner of excuses to avoid the suit. With the honourial court of the count unable to secure the appearance of the parties, the abbot petitioned the king, both personally and through his friends. At length the case was transferred to the royal court. The case dragged on as the king's other business delayed matters. Eventually a day was set, and 'after many subterfuges ... many dissimulations ... [and] much plaguing by the abbot and his men', the case was given a hearing and the land was finally restored to the abbot.<sup>27</sup>

### **The Angevin Reforms**

Lawsuits in the early years of Henry II's reign might therefore have suffered long delays, exacerbated by procedural uncertainty and the problem of securing the attendance of litigants at court. Such problems were addressed by the design of the new Angevin procedures. Different types of dispute were sorted into distinct forms of action, and each type of case was regulated by tightly configured procedural rules.

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<sup>26</sup> Ibid., no. 377, at 337-341.

<sup>27</sup> Ibid., no. 377, at 339-340. Quotation at 339.

The first actions to be developed were perhaps influenced by the Roman law distinction between *possessio* and *proprietas*. The legal treatise known as *Glanvill*, written c. 1188, explains that they concerned an individual's entitlement to 'seisin only'.<sup>28</sup> In this context, seisin was roughly analogous to possession, and was contrasted to 'right' to land, which obtained a more proprietary character.<sup>29</sup> The new procedures therefore became known as the possessory, or petty, assizes. While actions of right might continue to be brought in the seigniorial and county courts, the possessory assizes brought the case directly before the king's justices. *Glanvill* lists a number of procedures concerning seisin, although four examples are discussed in particular detail: the assize *utrum*, *novel disseisin*, *mort d'ancestor*, and *darrein presentment*.<sup>30</sup>

An early form of the assize *utrum* can be found in the 1164 Constitutions of Clarendon.<sup>31</sup> The assize led to a recognition as to whether land was held as a lay or an ecclesiastical fee, and thus whether it fell under secular or ecclesiastical jurisdiction.<sup>32</sup> *Novel disseisin*, probably created in 1166, called for a recognition as to whether the defendant had 'unjustly and without judgment' disseised the demandant of their free tenement.<sup>33</sup> *Mort d'ancestor*, established at the 1176 Council of Northampton, was designed to allow the nearest heir of a deceased tenant to claim seisin of their ancestor's land.<sup>34</sup> A recognition was called upon to answer the question of whether the claimant was the next heir of the ancestor, and whether the latter had died seised 'in demesne and as of fee' of the land in question; that is, in direct possession (although possibly with

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<sup>28</sup> *Glanvill*, XIII, 1 (Hall, 149).

<sup>29</sup> *Ibid.*, I, 3 (Hall, 4) and *ibid.*, XIII, 1 (Hall, 148).

<sup>30</sup> *Ibid.*, XIII, 1-39 (Hall, 148-170).

<sup>31</sup> John Hudson, *The Oxford History of the Laws of England, Volume II, 871-1216* (Oxford: Oxford University Press, 2012), 607-608.

<sup>32</sup> *Glanvill*, XIII, 23-24 (Hall, 163).

<sup>33</sup> *Ibid.*, XIII, 32-37 (Hall, 167-169); Hudson, *Oxford History*, 609-610.

<sup>34</sup> Hudson, *Oxford History*, 604-605.



unfree tenants) of land which was capable of descending heritably.<sup>35</sup> *Darrein presentment*, created towards the end of the 1170s, used a recognition to determine the identity of the individual who presented the last parson to a church, and thus who should have seisin of the disputed advowson.<sup>36</sup>

In addition to the new possessory actions, the grand assize was introduced, probably in 1179 at the Council of Windsor, to provide an alternative procedure through which actions of right could be decided.<sup>37</sup> Once the tenant had elected to put himself on the grand assize, the case, if it was being heard in a seigniorial or county court, was put before the king's justices. A recognition was then held to determine which party had the greater right to the tenement in dispute.<sup>38</sup>

Recognitions were perhaps favoured by the Angevin reformers because they resolved cases through human reason.<sup>39</sup> It is possible that confidence in supernatural modes of proof had waned throughout the course of the twelfth century, and *Glanvill* talks about the 'doubtful' outcome of trial by battle.<sup>40</sup> It should be noted, however, that the Angevin reformers retained trial by ordeal as a mode of proof in criminal procedures.<sup>41</sup> The discussion in *Glanvill* may therefore simply reflect the concern that judicial combat favoured the strong, and not amount to a criticism of supernatural proof

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<sup>35</sup> *Glanvill*, XIII, 3 (Hall, 150). Alternative writs of *mort d'ancestor* were available for use in specific circumstances, for example if the claimant's ancestor had died on pilgrimage, or entered religion and thus 'died' to the secular world. *Glanvill*, XIII, 4-6 (Hall, 150-151).

<sup>36</sup> *Glanvill*, XIII, 18-19 (Hall, 160-161); Hudson, *Oxford History*, 607.

<sup>37</sup> Hudson, *Oxford History*, 600.

<sup>38</sup> *Glanvill*, II, 6-21 (Hall, 26-37).

<sup>39</sup> Donald W. Sutherland, *The Assize of Novel Disseisin* (Oxford: Oxford University Press, 1973), 36-38. See also Masschaele, *Jury, State, and Society*, 68.

<sup>40</sup> *Glanvill*, II, 7 (Hall, 28). For a discussion on attitudes to supernatural proof in the twelfth century, see Charles M. Radding, 'Superstition to Science: Nature, Fortune, and the Passing of the Medieval Ordeal', *AHR* 84 (1979): 945-969, and R.C. van Caenegem, *Legal History: A European Perspective*, (London: Hambledon, 1990), 73-113. For a contrasting view, see Robert Bartlett, *Trial by Fire and Water: The Medieval Judicial Ordeal* (New York: Oxford University Press, 1986), especially chapter 4.

<sup>41</sup> Hudson, *Oxford History*, 533.

in general.<sup>42</sup> Recognitions may also have been favoured because they directly involved members of the local community in the case. It was perhaps hoped that community pressure would encourage litigants to settle their disputes rather than drag them through the courts. It may also have been hoped that, when cases did go to judgment, the losing parties would be discouraged from disputing a verdict delivered by their neighbours.

### **Efficiency and the Angevin Legal Reforms**

The new assizes introduced by the Angevin reformers aimed to ensure that cases proceeded swiftly to judgment. The procedural stages of the actions were carefully designed so that litigants had limited opportunities to delay the case.<sup>43</sup>

The desire for swift justice is particularly apparent in the design of the possessory assizes. Once a writ initiating the action had been obtained from the chancery, the sheriff was instructed to select twelve freemen from the neighbourhood of the tenement in dispute as recognitors. Both the demandant and the tenant (the defendant) could be present when the twelve freemen were elected. However, the election would take place whether or not the tenant appeared.<sup>44</sup> The sheriff then arranged for the recognitors to make a view of the disputed tenement. Again, the tenant would be summoned only once. If he was not present at the first summons, the view would take place in his absence.<sup>45</sup>

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<sup>42</sup> Ibid., 534.

<sup>43</sup> For further discussion about the continuing development of procedural rules designed to minimise delay in the thirteenth and fourteenth centuries, see Paul Brand, 'Delay in the English Common Law Courts, (Thirteenth to Fourteenth Centuries)', in *The Law's Delay: Essays on Undue Delay in Civil Litigation*, ed. C.H. van Rhee (Antwerp-Groningen: Intersentia, 2004), 31-45.

<sup>44</sup> *Glanvill*, XIII, 7 (Hall, 152).

<sup>45</sup> Ibid., XIII, 7 (Hall, 152).

Rules concerning the tenant's appearance at court on the day of the recognition were also designed to minimise delays. With the exception of *novel disseisin*, which is discussed separately below, the same basic procedure applied in all the possessory assizes. The sheriff was first to summon the tenant 'to be before the king or his justices on the day stated in the writ'.<sup>46</sup> If the tenant was absent on the day of the hearing, he would be resummoned once. The recognition would take place at the subsequent hearing regardless of whether or not he appeared.<sup>47</sup>

Rather than simply not turning up, the tenant might instead send a formal excuse for non-attendance, known as an *essoin*, in an attempt to secure a postponement. However, restrictions were placed on the type of *essoins* which could be used. The *essoin* which could often cause the longest delays, that concerning 'bed-sickness' (*de malo lecti*), was inadmissible in possessory actions.<sup>48</sup> This *essoin* concerned situations in which an individual was too ill to rise from their sick-bed, and required the case to be postponed for at least a year.<sup>49</sup> Other types of *essoin*, those concerning difficulty in reaching court (*de malo veniendi*), were nevertheless allowed. These concerned other problems encountered by litigants in appearing before the justices and were often sent due to illness on the journey to court, in which case the hearing would be postponed for at least a fortnight.<sup>50</sup> The number of *essoins de malo veniendi* allowed to the tenant was, however, limited. According to *Glanvill*, no more than two successive *essoins* were

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<sup>46</sup> Ibid., XIII, 7 (Hall, 152).

<sup>47</sup> See Brand, 'Delay in the English Common Law Courts', 32.

<sup>48</sup> *Glanvill*, XIII, 25, (Hall, 164).

<sup>49</sup> Ibid., I, 19, (Hall, 11-12).

<sup>50</sup> Other *essoins*, also classified as *essoins de malo veniendi*, could sometimes lead to longer delays. For example, it was possible for an individual to send an *essoin* on account of being on the king's service, which might see the case postponed until they returned from their service in the king's army. See generally, *Glanvill*, I, 11-29 (Hall, 7-17). See also Meekings, *Surrey*, 1: 36.

allowed in a possessory action before appearance was expected at court.<sup>51</sup> If the defendant tried to send a third *essoins*, the recognition would proceed regardless.<sup>52</sup> The number of successive *essoins* available to litigants was further reduced in the years following *Glanvill*. By the time the legal treatise known as *Bracton* was written, c. 1230, only one *essoins de malo veniendi* was permitted before appearance was expected at court.<sup>53</sup> This rule in fact applied in any type of action for which *essoins* were allowed, and plea roll evidence suggests that it was in place by the end of the twelfth century.<sup>54</sup>

Rules concerning the vouching of a warrantor also reveal how considerations of speed influenced the procedural design of the possessory assizes. A warrantor was an individual who, if successfully vouched by the tenant, was bound to take up the defence of the plea. The author of *Glanvill*, writing at a time when the tenant was still allowed recourse to two successive *essoins de malo veniendi*, was unsure whether a warrantor should be awaited if they were not present in court, especially if they were vouched after the tenant had sent two *essoins*.<sup>55</sup> However, changes to the number of *essoins* available to the tenant after the treatise was written perhaps alleviated fears about the delay caused by such a voucher to warranty. Evidence from the early plea rolls shows that warrantors were, as a general rule, awaited.<sup>56</sup>

The desire for speed is all the more apparent in the assize of *novel disseisin*, which allowed for even less delay than the other possessory assizes. The action was

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<sup>51</sup> *Glanvill*, XIII, 7 (Hall, 152).

<sup>52</sup> *Ibid.*, XIII, 7 (Hall, 152).

<sup>53</sup> *Bracton*, 4: 82.

<sup>54</sup> *PBKJ*, 1: 156-157. The plea roll entries found by Lady Stenton to support this view relate to actions of right. However, it is reasonable to suggest that, if the procedure of the more dilatory action of right changed, the procedure of the swifter possessory assizes also changed.

<sup>55</sup> *Glanvill*, XIII, 30 (Hall, 166).

<sup>56</sup> Hudson, *Oxford History*, 616. See, e.g. *RCR*, 1:19.

intended to restore recent dispossessions, perhaps before the ejected party resorted to violent self-help, which meant that it was particularly important to resolve the case swiftly.<sup>57</sup> Here, rather than being summoned, the defendant was attached (made to find sureties for attendance at court) and no *essoins* were allowed at all. The assize would proceed on the day appointed for the recognition whether or not the defendant was present.<sup>58</sup> Likewise, the recognition would proceed if the defendant vouched a warrantor who was not present in court. There would be no waiting for the warrantor to be summoned.<sup>59</sup>

The grand assize was also designed with speed in mind. It was certainly intended to provide swifter justice than trial by battle, which might also be used to decide actions of right.<sup>60</sup> The decision of whether to choose the grand assize rested with the tenant. Before this choice could be made, however, the parties had to be convened in court and the demandant had to state his claim. Here, a number of opportunities for delay presented themselves. *Glanvill*, discussing actions of right heard in the king's court, explains that the tenant was allowed recourse to three successive *essoins* before appearing before the justices. Although, as we have seen, the number of successive *essoins de malo veniendi* allowed to litigants in the royal courts was later reduced, the tenant in an action of right could nevertheless delay his appearance before the justices by following his *essoin de malo veniendi* with an *essoin de malo lecti*.<sup>61</sup>

Once he had appeared in court, the tenant could request that certain free men of the county conduct a view of the tenement in dispute, although only if he had other

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<sup>57</sup> Sutherland, *Novel Disseisin*, 18-19.

<sup>58</sup> *Glanvill*, XIII, 38 (Hall, 169).

<sup>59</sup> *Ibid.*, XIII, 38 (Hall, 169).

<sup>60</sup> *Glanvill*, II, 7 (Hall, 28).

<sup>61</sup> *PBKJ*, 1: 157-158.

lands in the vill in which the disputed tenement was situated.<sup>62</sup> The tenant might then choose to put the case to the grand assize. Alternatively, the tenant might vouch a warrantor, who also had recourse to *essoins*. Further delay was therefore possible, and *Glanvill* speaks of the warrantor ‘eventually’ (*tandem*) appearing in court.<sup>63</sup> Actions of right proceeding in the county and seigniorial courts might have suffered similar delays until the tenant or their warrantor appeared in court and put themselves on the grand assize. It is possible, however, that some procedures of these courts differed from those of the king’s court.<sup>64</sup>

The procedure leading to the choice of proof in an action of right was therefore somewhat dilatory. Nevertheless, the procedure of the grand assize itself was designed to minimise postponements. In comparison with the procedure leading to trial by battle, which allowed both the tenant and his champion further *essoins* before the battle was fought, the grand assize offered fewer opportunities for delay.<sup>65</sup> *Glanvill* describes the assize in the following terms:

This assize is a royal benefit granted to the people by the goodness of the king ... justice, which is seldom arrived at by battle even after many and long delays, is more easily and quickly attained through its use. Fewer *essoins* are allowed in the assize than in battle ... and so the people generally are saved trouble and the poor are saved money.<sup>66</sup>

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<sup>62</sup> *Glanvill*, II, 1 (Hall, 22).

<sup>63</sup> *Ibid.*, III, 1, (Hall, 38). See also Hudson, *Oxford History*, 596-597.

<sup>64</sup> Hudson, *Oxford History*, 588.

<sup>65</sup> *Glanvill*, II, 7 (Hall, 28) and II, 12 (Hall, 31). *Glanvill*’s statement concerning the number of *essoins* allowed in trial by battle may be found at *Glanvill*, II, 3 (Hall, 23). Note, however, the above discussion on the limitation of successive *essoins de malo veniendi* which was in place by the end of the twelfth century.

<sup>66</sup> *Ibid.*, II, 7 (Hall, 28).

Once the tenant had put himself on the assize, the sheriff was ordered to summon four knights of the neighbourhood to appear before the royal justices. These four knights were then to elect twelve knights of the neighbourhood as recognitors.<sup>67</sup> This more formal process of election, and the fact that the recognitors were required to be of knightly status, reflects the fact that the ultimate issue of right, rather than seisin, was at stake. The procedure was nevertheless streamlined because the tenant could not delay proceedings by *essoining* himself on the day of the election. *Glanvill* explains that the court could direct the four knights to make the election whether or not the tenant was present.<sup>68</sup> Furthermore, it was possible for the election of the recognitors to proceed if some of the four knights appointed to the task were absent. Provided the tenant was present, and both parties consented, the election could be made by the knights who had turned up together with ‘other knights of the same county if any such can be found in court’.<sup>69</sup> According to *Glanvill*, ‘for greater safety and to avoid all quibbling’, six or more knights were often summoned to make the election.<sup>70</sup> Once the knights who were to take the grand assize had been elected, a day was appointed for the recognition to take place. Speed was, again, of the essence. On the day of the recognition the tenant was allowed no *essoins*, and the assize would proceed regardless of whether or not he was present in court.<sup>71</sup>

## The Reforms in Practice

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<sup>67</sup> Ibid., II, 10-11 (Hall, 30-31).

<sup>68</sup> Ibid., II, 12 (Hall, 31).

<sup>69</sup> Ibid., II, 12 (Hall, 32).

<sup>70</sup> Ibid., II, 12 (Hall, 32): ‘*Ad maiorem eciam cautelam et ad omnem cauillationem devitandam*’.

<sup>71</sup> Ibid., II, 16 (Hall, 33-34).

Although careful thought had gone into the design of the new actions, the swift progress of cases to judgment also depended upon the arrival of the recognitors in court on the day of the recognition. This was by no means guaranteed. They too were allowed *essoins*, although in keeping with restrictions placed on the number of successive *essoins de malo veniendi* allowed to litigants, each recognitor was probably allowed only one *essoin* before they were expected to appear before the justices. Those who were incapacitated by a long illness were probably replaced.<sup>72</sup> Recognitors might also default, neither appearing nor sending an *essoin*.

Let us, therefore, examine the extent and impact of these absences. The following analysis considers the effect of recognitor absences on the four possessory assizes discussed above (*utrum*, *novel disseisin*, *mort d'ancestor* and *darrein presentment*) and on actions proceeding to the grand assize.

The majority of assizes were probably heard locally, during visitations to the counties undertaken by the itinerant justices.<sup>73</sup> Many of these visitations took place during a general eyre, when the country would be divided into several circuits and groups of justices would travel along each circuit and hold sessions in the counties through which they passed.<sup>74</sup>

The sessions held at the eyre do not appear to have been severely affected by the non-attendance of recognitors, probably because of the local nature of the hearings. Some recognitors may already have been in court, conducting their own litigation

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<sup>72</sup> Although it should be noted that plea roll entries often fail to provide details as to why a recognitor had been removed. See, e.g. *CRR*, 2: 193; *CRR*, 5: 201.

<sup>73</sup> Sutherland, *Novel Disseisin*, 60, n.1.

<sup>74</sup> For further details, see David Crook, *Records of the General Eyre* (London: H.M.S.O., 1982). See also Meekings, *Surrey*.



before the justices. Others, if not already in court, would have been able to travel to the location of the hearing without encountering too many difficulties. Nevertheless, some visitations fared better than others, and we find some sessions in which a number of actions were postponed for lack of recognitors.

A sample of plea rolls made at the eyre illustrates this point. Many of the entries contained in the early plea rolls of the royal courts record routine administrative business, such as parties appointing attorneys, litigants sending *essoins*, justices granting the parties permission to reach a settlement, and so on. However, a significant number of entries concern cases which had successfully navigated all procedural impediments and were ready to proceed to a recognition.

The plea roll of the 1194 Wiltshire visitation, for example, contains records of 17 assizes ready to proceed to a recognition. All were able to do so. There are no entries which record that an assize was postponed because too many recognitors were absent.<sup>75</sup> A roll from a Bedford and Buckinghamshire visitation of 1194-5 shows 14 assizes ready to hear the oath of the recognitors. This time, however, 11 assizes proceeded but three actions were postponed because insufficient recognitors appeared at court.<sup>76</sup> The records from a 1198 Hertford, Essex and Middlesex visitation show 26 assizes ready to proceed to a recognition. We find that the recognition proceeded in 25 of these cases, whilst one

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<sup>75</sup> *Three Rolls of the King's Court in the Reign of King Richard the First A.D. 1194- 1195*, ed. F.W. Maitland, Pipe Roll Society, 14 (London: Wyman and Sons, 1891), (henceforth: *Three Rolls of the King's Court*), cases proceeding to recognition (references are to page numbers in this and all following footnotes unless stated otherwise): 65 (two cases), 66, 66-67, 67 (two cases), 67-68, 69 (two cases), 70, 71, 71-72, 72 (two cases), 73, 73-74, 74.

<sup>76</sup> *Three Rolls of the King's Court*, cases proceeding to the recognition: 120-121, 126, 129 (two cases), 130 (two cases), 131, 131-132, 132, 134, 134-135; cases postponed: 128, 128-129, 129.

case was postponed because of absent recognitors.<sup>77</sup> The plea roll of the 1201 Cornwall visitation contains records of 43 assizes ready to proceed to a recognition. We find that 42 assizes were able to do so and, again, one case was postponed for lack of recognitors. It is notable that the case which was delayed concerned land in Dorset and nine recognitors sent *essoins*. These recognitors would have been required to undertake a journey outside their home county to reach the location of the hearing, which perhaps explains why so many were absent.<sup>78</sup> Finally, the plea roll of the main 1202 Northamptonshire visitation provides evidence of 33 assizes ready to proceed to a recognition. We find that 30 assizes were able to do so, whilst three were postponed as a result of recognizer absences.<sup>79</sup>

Although a complete survey of eyres from this period is impossible because of the fragmentary nature of the surviving rolls, this sample suggests that recognitors were reasonably diligent in presenting themselves before the itinerant justices on the required day. Nevertheless, a few cases were delayed because insufficient recognitors appeared in court. ‘Foreign pleas’, cases from a county other than the one in which the justices were holding their session, were perhaps the most susceptible to such postponements. This point is further illustrated by the records of ‘outstanding pleas’ (*‘residua placitorum’*) heard by the justices during a short session held at Northampton in August

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<sup>77</sup> *RCR*, 1, cases proceeding to the recognition: 154 (four cases), 155 (three cases), 157, 174, 176 (three cases), 177 (three cases), 188-189, 189, 190, 191 (two cases), 192, 193, 196, 198, 213; case postponed: 194.

<sup>78</sup> *PBKJ*, 2, cases proceeding to the recognition: nos. 410, 411, 412, 414, 415, 418, 419, 420, 423, 425, 426, 430, 431, 436, 438, 439, 440, 441, 442, 445, 450, 451, 453, 455, 456, 461, 462, 464, 465, 466, 468, 470, 471, 476, 478, 485, 488, 496, 500, 501, 536, 545; case postponed: no. 427.

<sup>79</sup> All pleas for this term are printed in *Northants* except the Lincolnshire pleas heard at Northampton, which are printed in *Lincs*. A compilation of these two publications provides the figures. Cases proceeding to the recognition: *Northants*, nos. 372, 374, 377, 382, 394, 413, 417, 421, 422, 423, 424, 429, 439, 448, 450, 454, 534, and at page 86 (no plea number in printed edition). *Lincs*, nos 1139, 1140, 1141, 1144, 1145, 1162, 1167, 1178, 1179, 1183, 1185, 1186; cases postponed: *Northants*, nos, 525, 544; *Lincs*, no. 1171 (in this last assize the defendant subsequently conceded the case).

1202, before the county's main visitation in September. These outstanding pleas were probably cases adjourned from the previous sessions held by the justices at Lincoln, Leicester and Coventry.<sup>80</sup> We find seven actions ready to proceed to a recognition. However, five were postponed for lack of recognitors.<sup>81</sup> As with the case from Dorset heard at the 1201 Cornwall visitation, it is likely that many recognitors were absent because they were required to leave their home county and make a significant journey to reach the court.

Despite the convenience of the eyre, visitations of the itinerant justices took place only intermittently. Between 1176 and 1194 there were general eyres, on average, slightly more often than once every two years. Visitations occurred less frequently from 1194 onwards, with general eyres held in 1194-5, 1198-9, 1201-3 and 1208-9.<sup>82</sup> Justices would occasionally travel to certain counties in the intervening years to hear assizes, often those of *novel disseisin*, but these visitations did not occur frequently, nor did they allow a wide range of other pleas to be heard.<sup>83</sup> Litigants who did not wish to wait until the next eyre might instead attempt to have their cases heard at the Bench or before the court *coram rege*. With this in mind, let us now turn to the records of these courts.

When the king was out of the country, cases which were not brought before the itinerant justices would come to the Bench. This meant that a significant number of

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<sup>80</sup> See Doris M. Stenton's comments in *Lincs*, xxxv.

<sup>81</sup> Cases proceeding to the recognition: *Lincs*, no. 1122, *Northants*, no. 290; cases postponed: *Lincs*, nos 1121, 1123, 1124, 1125, 1133.

<sup>82</sup> Hudson, *Oxford History*, 545. For dates of the general eyres of this period, see Crook, *Records of the General Eyre*, 56-71.

<sup>83</sup> Hudson, *Oxford History*, 548.

assizes were heard at Westminster.<sup>84</sup> In contrast to the eyre, however, hearings at the Bench often suffered postponements as a result of recognitor absences.

A sample of plea rolls illustrates the extent of the problem. By the end of the twelfth century, the Bench divided its annual business into four terms: Hilary, Easter, Trinity and Michaelmas. The earliest surviving plea roll of the court is a roll of seven membranes recording pleas heard in the 1194 Trinity term.<sup>85</sup> This contains records of six assizes ready to proceed to a recognition. However, only two were able to do so, whilst four were postponed as insufficient recognitors arrived at court.<sup>86</sup> Other plea rolls reveal similar results. For example, the two surviving main rolls of the 1198 Easter term, printed as Rolls 8A and 8B in the *Curia Regis Rolls* series, record 11 assizes ready to hear the oath of the recognitors. Of these, only four proceeded to the recognition, whilst seven were postponed as a result of recognitor absences.<sup>87</sup>

The plea rolls of the Bench begin to survive in greater numbers from the first years of the thirteenth century onwards. A precise statistical analysis nevertheless remains impossible as a number of membranes are damaged, missing or of uncertain date. However, the greater availability of evidence further illustrates the extent of the

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<sup>84</sup> Sutherland, *Novel Disseisin*, 60, n.1.

<sup>85</sup> See Maitland's introductory comments in *Three Rolls of the King's Courts*, xvi-xix.

<sup>86</sup> *Three Rolls of the King's Court*, cases proceeding to recognition: 2, 39; cases postponed: 5, 13, 23, 47. Note also a further case at 5, postponed 'pro defectu recti', where it is recorded that many of the recognitors were absent on the day of the hearing. This may suggest scribal error, and that the clerk meant to write an abbreviated form of *pro defectu recognitorum* in the roll.

<sup>87</sup> Roll 6 also covers this term but contains duplicate entries. The printed membranes of these rolls are scattered between three publications. Roll 8A is printed in *RCR*, 1: 138-148. Half of Roll 8B is printed in *CRR*, 1: 55-68. The other half is printed in *The Memoranda Roll for the tenth year of the reign of King John (1207-8): together with the Curia Regis Rolls of Hilary 7 Richard I (1196) and Easter 9 Richard I (1198), a Roll of Plate held by Hugh de Neville in 9 John (1207-8), and fragments of the Close Rolls of 16 and 17 John (1215-16)*, ed. R.A. Brown, Pipe Roll Society, New Series, 31 (London: J.W. Ruddock, 1957), 96-118. Cases proceeding to the recognition: *CRR*, 1: 57, 58; *RCR*, 1: 139, 141; cases postponed: *Memoranda Roll for the Tenth Year of King John*, 103; *CRR*, 1: 53 (two cases), 63, *RCR*, 1: 139, 141, 142-143.

problem. The pleas brought before the Bench in the 1200 Hilary term, for example, are recorded in Rolls 19 and 20 of the *Curia Regis Rolls*.<sup>88</sup> They contain records of 33 assizes ready to proceed to a recognition. However, only 10 were able to do so, whilst the remaining 23 were postponed for lack of recognitors.<sup>89</sup> An examination of one more term of the court is all that is required to illustrate the point. The pleas of the 1200 Michaelmas term are recorded in Roll 24 of the *Curia Regis Rolls* (and duplicated in rolls 22 and 23).<sup>90</sup> We find records of 31 assizes ready to proceed to a recognition. Only eight were able to do so, whilst 23 were postponed because insufficient recognitors appeared in court.<sup>91</sup> Indeed, one assize was postponed twice for lack of recognitors. This case, a grand assize concerning land in Hertfordshire, first came before the justices on the octaves of Michaelmas. It was then put to the octaves of All Saints, later in the same term, where it was again postponed.<sup>92</sup>

It is not, in fact, uncommon to find a case postponed on multiple occasions for lack of recognitors. The above case was heard (and postponed) twice in the Michaelmas term because it first came before the justices at the very beginning of the term. This meant that the next hearing could be scheduled before the vacation which separated the Michaelmas and Hilary terms. However, many actions postponed in one term of the

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<sup>88</sup> *CRR*, 1: 115-171 (Roll 20); *RCR*, 2: 154-155 (Roll 19).

<sup>89</sup> Cases proceeding to the recognition: *CRR*, 1: 117, 119 (two cases), 121, 135, 136, (this entry is, however, left blank after the words '*juratores dicunt*'), 138, 139, 143, 149; cases postponed: *CRR*, 1: 116, 118, 119, 120, 122, 124, 132 (two cases), 133, 134 (two cases), 135, 136, 137 (this entry does not state a reason for the postponement but records that at least five recognitors were absent, which suggests that the case was postponed for this reason), 138, 139, (two cases) 140, 141 (two cases), 158, 159, 161.

<sup>90</sup> *CRR*, 1: 269-373.

<sup>91</sup> Cases proceeding to the recognition: *CRR*, 1: 271, 286, 287, 308, 320, 325, 332, 350; cases postponed: *CRR*, 1: 271, 272-273, 273, 288 (two cases), 289, 290 (two cases), 292, 295, 300, 305 (three cases), 306 (two cases), 310 (two cases), 321, 325, 326, 330 (subsequent hearing of case at 272-273), 333, 346. Note also 308 in which it appears that the sheriff was at fault for not sending to court a list of the names of the recognitors he had selected for the assize.

<sup>92</sup> *CRR*, 1: 272-3 and 330.

Bench were given a return day in a subsequent term.<sup>93</sup> This meant that cases suffering multiple postponements could drag on for months, if not years.

Perhaps the longest delay caused by absent recognitors is found in the dispute between Henry de Alneto of Cornwall, demandant, and Henry de Alneto of Maidford, tenant, concerning a knight's fee in Maidford, Northamptonshire. The case was brought before the Bench in the 1200 Trinity term.<sup>94</sup> The tenant requested a view of the disputed tenement and, in the 1201 Easter term, put himself on the grand assize.<sup>95</sup> The election of the recognitors for the grand assize took place in the 1201 Michaelmas term.<sup>96</sup> We next find the case in the records of the 1203 Easter term, when an attempt was made to take the recognition on the quindene of Easter (beginning 20 April).<sup>97</sup> However, the case had to be postponed to the octaves of Trinity (8 June) in the following Trinity term as only five recognitors appeared and the rest *essoined* themselves.<sup>98</sup> The case is next found in the records of pleas heard on the octaves of Michaelmas (6 October) in the 1203 Michaelmas term, which record another postponement as three recognitors *essoined* themselves, two came and the rest neither appeared nor sent an *essoin*. A day was given for the next hearing on the octaves of Martinmas (18 November).<sup>99</sup> At this hearing, only four recognitors came. The case was rescheduled to appear before the justices three

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<sup>93</sup> For a discussion of the schedule of postponements followed at the Bench, see Brand, 'Delay in the English Common Law Courts', 38-39.

<sup>94</sup> *CRR*, 1: 205, 244. This case is noted in C. T. Flower, *Introduction to the Curia Regis Rolls, 1199-1230 A.D.*, SS 62 (London: B. Quaritch, 1944), 131-132. It is also discussed in Peter Coss, *The Origins of the English Gentry* (Cambridge: Cambridge University Press, 2003), 48-49.

<sup>95</sup> *CRR*, 1: 473.

<sup>96</sup> *Ibid.*, 2: 27.

<sup>97</sup> Note that this and the subsequent calendar dates provided in this chapter mark the beginning of the legal 'return day', a period which lasted for up to seven calendar days. See Paul Brand, 'Lawyers' Time in England in the Later Middle Ages', in *Time in the Medieval World*, eds. Chris Humphrey and W. Mark Ormrod (York: York Medieval Press, 2001), 73-104, at 78.

<sup>98</sup> *CRR*, 2: 199-200.

<sup>99</sup> *Ibid.*, 3: 13.

weeks from Easter Sunday (16 May) the following year.<sup>100</sup> We have no record of this hearing and the case is next found in the plea roll of the 1204 Michaelmas term, which records that a hearing took place on the quindene of Michaelmas (13 October). On this day four recognitors came, six sent *essoins* and the remainder were absent without *essoins*. The case was postponed to the octaves of Martinmas (18 November), later in the same term.<sup>101</sup> At the following hearing no recognitor arrived or sent an *essoins*, although we are told that ‘afterwards’ (*postea*) some attempted to *essoins* themselves. A day was given on the quindene of Hilary (27 January) in the 1205 Hilary term.<sup>102</sup> Again, insufficient recognitors turned up at the hearing, and the case was postponed until three weeks from Easter Sunday (1 May).<sup>103</sup> Here, five recognitors were absent, none of whom sent an *essoins*. The case was postponed to be heard before the king at Northampton on the Sunday after the Feast of the Ascension (22 May).<sup>104</sup> At this hearing, perhaps because of the king’s presence in their home county, the recognitors all came to deliver their verdict.<sup>105</sup>

Both possessory actions and grand assizes suffered postponements because insufficient recognitors appeared at court. Even actions of *novel disseisin*, designed to provide an extremely swift remedy for recent, unjust dispossessions, were affected. For example, of the 23 assizes which were postponed for lack of recognitors in the 1200 Hilary term, eight were actions of *novel disseisin*,<sup>106</sup> seven were actions of *mort*

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<sup>100</sup> Ibid., 3: 67.

<sup>101</sup> Ibid., 3: 179.

<sup>102</sup> Ibid., 3: 229.

<sup>103</sup> Ibid., 3: 254-255.

<sup>104</sup> Ibid., 3: 307.

<sup>105</sup> Ibid., 3: 341.

<sup>106</sup> Ibid., 1: 119, 122, 133, 134, 137, 138, 159-160, 161.

*d'ancestor*,<sup>107</sup> five were grand assizes,<sup>108</sup> one was the assize *utrum*<sup>109</sup> and the nature of the plea is unspecified in the two remaining cases.<sup>110</sup> Possessory assizes could also suffer from multiple postponements. Richard Sillard, for example, brought an assize of *novel disseisin* against Richard son of Peter on the octaves of Trinity (8 June) in the 1203 Bench Trinity term. The case was postponed until the Sunday after the feast of St John the Baptist (27 June), which fell later in the same term, as an unspecified number of recognitors *essoined* themselves and five were absent without sending *essoins*.<sup>111</sup> At this later hearing five of the recognitors did not come or *essoins* themselves. A day was given on the octaves of Michaelmas (6 October) in the following Michaelmas term.<sup>112</sup> Here, the assize was finally able to be taken.<sup>113</sup>

Actions from the more outlying counties appear, quite understandably, to have been particularly affected by recognitor absences. In the 1200 Hilary term, for example, no assize from any county further afield than Suffolk could be taken. Hearings from Dorset, Gloucestershire, Leicestershire, Lincolnshire, Shropshire, Somerset, Staffordshire, Worcestershire and Yorkshire were all postponed for lack of recognitors.<sup>114</sup> This does not mean that actions from these counties never progressed to a recognition at Westminster. They might, however, suffer a significant number of postponements before all the recognitors appeared together before the justices.<sup>115</sup> It

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<sup>107</sup> Ibid., 1: 116, 118, 124, 132 (two cases), 141 (two cases).

<sup>108</sup> Ibid., 1: 120, 134-135, 135, 136, 158.

<sup>109</sup> Ibid., 1: 140.

<sup>110</sup> Ibid., 1: 139 (two cases).

<sup>111</sup> Ibid., 2: 254.

<sup>112</sup> Ibid., 2: 287.

<sup>113</sup> Ibid., 3: 4.

<sup>114</sup> See, e.g. *ibid.*, 1: 122 (Dorset), 132 (Lincolnshire and Gloucestershire), 134 (Yorkshire), 135 (Leicestershire), 138 (Worcestershire), 139 (Staffordshire), 159-160 (Shropshire), 161 (Somerset).

<sup>115</sup> See, e.g. *ibid.*, 1: 286 for recognitors finally giving their verdict in the action from Yorkshire which had been postponed in the 1200 Hilary term.



should be noted, however, that delays caused by absent recognitors were not confined to actions from the more distant counties. At the same 1200 Hilary term, for example, assizes from Bedfordshire, Essex and Sussex were also postponed because insufficient recognitors appeared at court.<sup>116</sup>

Let us now turn to the actions brought before the court *coram rege*. This court sat in the king's presence, and heard pleas only when the king was in England. Henry II was frequently abroad during the later years of his reign. Richard, likewise, was seldom in the country.<sup>117</sup> During these years the activity of the court diminished. John, however, spent more time in England than his predecessors, and during his reign a significant number of assizes were heard *coram rege*. Some cases were brought directly before the king, whilst others were transferred from the Bench or the eyre.<sup>118</sup>

The first surviving plea roll of the court dates from 1200 and contains pleas heard during John's brief stay in England from late February until mid-April.<sup>119</sup> However, later rolls cover longer periods of judicial activity and allow us to conduct a more extensive survey of the cases which came before the court. They show that, as with cases heard at Westminster, a large proportion of actions were postponed because of recognitor absences. For example, Roll 21 of the *Curia Regis Rolls* contains the record of the pleas heard by the court in the 1201 Easter term. It records five assizes ready to proceed to a recognition. However, only two were able to do so, whilst three were postponed for lack of recognitors.<sup>120</sup> Likewise, we find three assizes ready to

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<sup>116</sup> Ibid., 1: 118 (Sussex), 124 (Essex), 134-135 (Bedfordshire).

<sup>117</sup> See P&M, 1: 155, and Stenton, *English Justice*, 90.

<sup>118</sup> See Stenton, *English Justice*, 91-95.

<sup>119</sup> *PBKJ*, 1: 60-61. Roll printed at 296-310.

<sup>120</sup> *CRR*, 1: 413-441. Cases proceeding to the recognition: *CRR*, 1: 416, 430; cases postponed: *CRR*, 1: 414, 417, 440.

proceed to a recognition in the 1204 Easter term (the record of which is scattered amongst Rolls 36, 65 and 67 of the *Curia Regis Rolls*). Two assizes were concluded successfully, whilst one was postponed because insufficient recognitors appeared in court.<sup>121</sup>

Recognitors probably found it difficult to appear before the court *coram rege* because of the speed with which John travelled around the country.<sup>122</sup> Pleas frequently had to be heard some distance from their county of origin, and recognitors were often faced with a considerable journey to appear before the king.<sup>123</sup> A striking example is the action of *mort d'ancestor* brought by Richard Pikenet against John de Hudebovil concerning a knight's fee in Suffolk. The case was first heard *coram rege* in 1207 on the octaves of Michaelmas (6 October) while John was at Westminster. However, the case was postponed until the quindene of Martinmas (25 November) due to the default of the recognitors.<sup>124</sup> On this date the king was in Wiltshire.<sup>125</sup> Only two recognitors appeared in court, and the assize was again postponed until the octaves of Hilary (20 January) in the following year.<sup>126</sup> The case came before the king at Westminster, although the assize was again postponed because three recognitors were absent.<sup>127</sup> The case is next found in the rolls of pleas heard before the king on the octaves of Trinity (1 June), when the king was probably in Wiltshire.<sup>128</sup> It appears that the parties were present in court but once

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<sup>121</sup> Ibid., 3: 102-120. Cases proceeding to the recognition: *ibid.*, 3: 117, 118; cases postponed: *ibid.*, 3: 108.

<sup>122</sup> See the itinerary of King John set out in *RLP*.

<sup>123</sup> The phrase '*coram rege ubicumque fuerit in Anglia*' is often found in plea roll entries which record that a case is to come before the king on a certain date 'wherever he should be in England'. See, e.g. *PBKJ*, 1: no. 3289 and *CRR*, 1: 289.

<sup>124</sup> *CRR*, 5: 42. For information about the location of the court, see Doris M. Stenton's comments in *PBKJ*, 3: ccl.

<sup>125</sup> *PBKJ*, 3: ccl.

<sup>126</sup> *CRR*, 5: 68.

<sup>127</sup> *PBKJ*, 3: cclvi; *CRR*, 5: 133.

<sup>128</sup> See *RLP*, 'June 1208'.

again the case was postponed as none of the recognitors turned up.<sup>129</sup> The next hearing was scheduled for the quindene of St John the Baptist (8 July), on which date the king was apparently in Buckinghamshire.<sup>130</sup> The next record of the case, however, appears in the roll of pleas heard before the king on the quindene of St Michael (13 October) at Gloucester. By this stage the parties had reached a settlement, having perhaps lost hope of a recognition ever taking place. They were now in pursuit of a chirograph which would record the terms of their agreement. Both parties came to court, although for an unspecified reason the matter was postponed and the parties were instructed to appear before the itinerant justices who had recently set out on eyre.<sup>131</sup>

### **Attempts to Prevent Postponements**

Delays caused by absent recognitors were therefore common at both the Bench and the court *coram rege*. Attempts were nevertheless made to prevent such postponements. As advised by *Glanvill*, more than twelve knights were often elected to form the grand assize.<sup>132</sup> It became common to nominate sixteen individuals, although during our period numbers could vary.<sup>133</sup> It was hoped that, even if some failed to arrive, at least twelve would be present in court ready take the assize. This also meant that, if more than twelve appeared in court, substitutes would be available if the impartiality of a recognitor was challenged.<sup>134</sup> Likewise, additional recognitors were sometimes appointed to possessory assizes, especially if the case had suffered previous delays

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<sup>129</sup> *CRR*, 5: 226.

<sup>130</sup> *RLP*, 'July 1208', and *PBKJ*, 3: cclviii.

<sup>131</sup> *CRR*, 5: 306.

<sup>132</sup> *Glanvill*, II, 12 (Hall 31-32).

<sup>133</sup> See, e.g. *RCR*, 1: 140-141, 146, 158, 189-190.

<sup>134</sup> Meekings, *Surrey*, 52.

because of recognitor absences. The plea rolls frequently record that the sheriff was ordered to find so many recognitors that the assize would not stand over due to their absence (*'et tot apponat quod assisa non remaneat'*).<sup>135</sup> While it is impossible to determine the number of cases saved from postponement by this approach, the above evidence suggests that such tactics met with limited success. This is shown explicitly in some cases. In 1200, for example, a grand assize was postponed even though sixteen recognitors had been summoned. Five of the knights *essoined* themselves, leaving only eleven in court on the appointed day.<sup>136</sup>

By the time *Bracton* was written, c. 1230, actions of *novel disseisin* were allowed to proceed with as few as seven recognitors present.<sup>137</sup> It does not, however, appear that this rule was in operation during our earlier period.<sup>138</sup> Furthermore, it remained essential to secure the presence of twelve recognitors to hear the other assizes.<sup>139</sup> *Bracton* nevertheless suggests that absent recognitors might be replaced with other individuals who were present in court on the day of the hearing. The new recognitors could then swear their oath saving the fact that they had not made the view.<sup>140</sup> It is unclear whether this was possible during our earlier period. If so, it could help explain why relatively few cases were postponed for want of recognitors at the eyre. Potential replacements must have been easy to find amongst the county's freeholders who had come to conduct their own business in court. However, it would

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<sup>135</sup> See, e.g. *CRR*, 1: 141, 287-288, 346, 400.

<sup>136</sup> *CRR*, 5: 177.

<sup>137</sup> *Bracton*, 3: 71 and 3: 58; Meekings, *Surrey*, 70; Sutherland, *Novel Disseisin*, 67, n.5.

<sup>138</sup> See, e.g. *CRR*, 2: 287 (concerning Richard Sillard's case, discussed above. The assize was postponed because five recognitors were absent, despite the fact that, presumably, seven were present in court ready to take their oath).

<sup>139</sup> *Bracton*, 3: 254.

<sup>140</sup> *Ibid.*, 3: 63 and 3: 254.

have been more difficult to find individuals from the neighbourhood who could stand in as recognitors when cases were heard at the Bench or court *coram rege*.

### **Deliberate Absences**

Some recognitors may have met with genuine difficulties as they attempted to reach court, especially if they had set out on a long journey.<sup>141</sup> However, as Lady Stenton noted, a great number did not even send *essoins* (assuming that the individual charged with delivering the *essoins* had not been waylaid). This may suggest that they had deliberately reneged on their responsibilities.<sup>142</sup> Furthermore, even those who sent *essoins* may have done so dishonestly, inventing a fictitious excuse to avoid appearing in court.<sup>143</sup>

Serving as a recognitor certainly seems to have been unpopular. Henry II's contemporary Ralph Niger complained bitterly that the king weighed down nearly everyone in the country with recognitions and other duties owed to the royal administrative system.<sup>144</sup> Indeed, many recognitors seem to have been eager to evade their duties. The chronicler Jocelin of Brakelond, for example, mentions a case from 1187 in which the king summoned twelve knights to Westminster to make a recognition about certain rights of the Liberty of St Edmund. This appears to have been a

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<sup>141</sup> For a discussion of the difficulties which could be encountered while travelling to court in the later Middle Ages, see Paul Brand, 'The Travails of Travel: The Difficulties of Getting to Court in Later Medieval England', in *Freedom of Movement in the Middle Ages, Proceedings of the 2003 Harlaxton Symposium*, ed. Peregrine Horden (Donington: Shaun Tyas, 2007), 215-228.

<sup>142</sup> *PBKJ*, 1: 166.

<sup>143</sup> For a similar view on the evident lack of diligence displayed by recognitors, see Coss, *The Origins of the English Gentry*, 49.

<sup>144</sup> 'Scutagiis, recognitionibus, et variis angariarum alluvionibus fere omnes depressit'. Ralph Niger, *Chronicle*, ed. R. Anstruther (London: Caxton Society, 1851), 168.

recognition crafted specially for the dispute at hand. The summons demanded that half the recognitors should be from Norfolk, and half from Suffolk. However, Jocelin explains, six knights were found who held land in both counties. Only these six were sent 'to save labour and expense'.<sup>145</sup> Some individuals even went so far as to obtain grants of exemption from serving on recognitions. As White noted, these exist even on the earliest chancery enrolments.<sup>146</sup> Such exemptions in fact became so common towards the middle of the thirteenth century that there were complaints that too few knights were available in certain counties to take grand assizes.<sup>147</sup>

There are many factors which may have encouraged recognitors to stay at home rather than play their part in the administration of justice. The journey required to reach the Bench or the court *coram rege* must have deterred a number of recognitors from even attempting to appear in court. Distances of about twenty-five miles a day were perhaps possible on horseback along good roads, although fewer miles could be covered on foot or with pack-horses.<sup>148</sup> This means that many recognitors would have been required to travel for a number of days to reach the location of the hearing. Those from outlying counties such as Northumberland, Yorkshire and Cornwall would have faced a journey of well over a week to reach Westminster. Even if the king's highways were kept in good condition, other roads might have been less well-maintained and journeys could have taken considerably longer.<sup>149</sup> As White commented, these journeys brought

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<sup>145</sup> H.E. Butler, ed., *The Chronicle of Jocelin of Brakelond* (London: Nelson, 1949), 65.

<sup>146</sup> White, *Self-Government*, 72.

<sup>147</sup> *Petition of the Barons* 1258, cap. 28. See Paul Brand, *Kings, Barons and Justices: The Making and Enforcement of Legislation in Thirteenth-Century England* (Cambridge: Cambridge University Press, 2003), 333-334, 421. See also Scott L. Waugh, 'Reluctant Knights and Jurors: Respites, Exemptions and Public Obligations in the Reign of Henry III', *Speculum* 58 (1983): 937-986, at 937.

<sup>148</sup> Robert Bartlett, *England Under the Norman and Angevin Kings, 1075-1225* (New York: Oxford University Press, 2000), 363. See also M.N. Boyer, 'A Day's Journey in Medieval France', *Speculum* 26 (1951): 957-608.

<sup>149</sup> Bartlett, *England Under the Norman and Angevin Kings*, 363.

sickness and other dangers.<sup>150</sup> They might also lead to considerable financial loss.

Richard de Anstey's account of his travels around England in pursuit of his claim against Mabel de Francheville illustrates the ease with which valuable horses could be lost on long journeys. Richard made two journeys to Southampton and lost a palfrey on the first journey and a pack horse on the second. His brother and another helper also each lost a palfrey travelling around the country in support of his claim.<sup>151</sup>

Recognitors perhaps also dwelt on the possibility that, after all their efforts to appear in court, the case might nevertheless be postponed. The action could be delayed by a litigant's *essoïn*, a voucher to warranty, or even the absence of other recognitors. The temptation to stay at home and avoid the risk of a wasted journey must have been great, especially if the case was scheduled to be heard many miles away at the Bench or before the court *coram rege*.<sup>152</sup>

It is possible that such concerns were shared amongst the recognitors before the hearing. The view of the disputed tenement, a procedural requirement of the possessory assizes, would have provided an ideal opportunity for the recognitors to discuss the case amongst themselves. Other opportunities for communication would also have been available, especially as all those involved were from the same neighbourhood. If a number of recognitors made it obvious to the others that they intended to avoid the hearing, thus making a postponement inevitable, the remainder would see little reason to attend. The same might be true if they realised that they knew insufficient facts about

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<sup>150</sup> White, *Self-Government*, 68.

<sup>151</sup> *Lawsuits*, 2: no. 408, at 397-404.

<sup>152</sup> See Doris M. Stenton's comments in *PBKJ*, 1: 166.

the case, and that they would be unable to answer the questions which would be put to them at the recognition.

Other considerations, besides the length of the journey to court, might also have encouraged recognitors to stay at home. Maitland highlighted how recognitions could put the recognitors into conflict with powerful individuals who had an interest in the case.<sup>153</sup> Some may even have been subject to intimidation before the hearing. Absence might therefore have been a method of self-preservation if reprisals were feared following the verdict. Again, the view of the tenement in dispute may have provided the ideal opportunity for communication between those involved in the case. The litigants could meet with the recognitors as a group, and one or both of the parties might use the opportunity to issue threats. The view was not, however, the only opportunity for certain individuals or their supporters to intimidate the recognitors. As those involved in the case probably lived near each other, there would have been many such opportunities in the days or weeks preceding the hearing.

The lack of effective sanctions against errant recognitors would have further encouraged them to ignore a summons.<sup>154</sup> A recognitor who was absent and had not sent an *essoin* would often be attached.<sup>155</sup> If they defaulted again they were likely to be reattached and made to find better sureties. On their third default, the sheriff might be issued with an order of *habeas corpus* and made personally responsible for their appearance in court, with the power to seize chattels or perhaps arrest the individual if

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<sup>153</sup> P&M, 2: 631.

<sup>154</sup> See also Kathryn Faulkner, 'The Transformation of Knighthood in Thirteenth-Century England', *EHR* 111 (1996): 1-23, at 17.

<sup>155</sup> See, e.g. *CRR*, 1: 252 and 118.



necessary.<sup>156</sup> Some entries expressly record that the recognitors who defaulted were to be amerced.<sup>157</sup> However, these measures do not appear to have been particularly effective. It is not uncommon to find recognitors who had been attached defaulting again.<sup>158</sup> There is sometimes no acknowledgement in the rolls that absent recognitors had previously been attached, even though this was clearly ordered at the earlier hearing.<sup>159</sup> Likewise, amercements for non-appearance were rarely severe, often probably half a mark or one mark.<sup>160</sup> As James Masschaele has suggested, many recognitors must have viewed them as ‘utterly fair trade-offs’ for staying at home and shirking the job.<sup>161</sup> Furthermore, the above procedures were designed to apply cumulative coercive pressure on repeat offenders. They were less effective if a different group of recognitors were absent at each hearing. It is true that harsher penalties for non-attendance could have been introduced, but this risked losing whatever goodwill remained in the very people on whom the system depended. The result was that many recognitors were able to avoid court without much thought for the consequences.

## Conclusion

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<sup>156</sup> See, e.g. *ibid.*, 1: 292. This was the mesne process followed in personal and mixed actions, although in our period the procedure as concerning recognitors might not have been as clearly structured as the developed mesne process of the later thirteenth century. See Brand, ‘Delay in the English Common Law Courts’, 33. See also Meekings, *Surrey*, 52 and 78.

<sup>157</sup> See, e.g. *PBKJ*, 2: no. 866; *CRR*, 1: 288; and *CRR*, 5: 192. See also Flower, *Introduction*, 453.

<sup>158</sup> See, e.g. *CRR*, 1: 254 and *CRR*, 2: 287.

<sup>159</sup> See, e.g. *ibid.*, 2: 4 and 51.

<sup>160</sup> See, e.g. the amercement roll published in *The Roll of the Shropshire Eyre of 1256*, ed., Alan Harding, SS 96 (London: Selden Society, 1981), 332-343. This roll dates from a slightly later period than the one covered by this chapter, but contains clear examples of amercements for recognitor non-attendance. These are sometimes less easily identifiable in earlier records. It is likely, however, that such amercements were of a similar level in the twelfth century. We often find, for example, amercements of half a mark or one mark exacted for unspecified defaults (which may include recognitor non-attendance) in the earliest plea rolls. See, e.g. the amercements of the 1198 Hertfordshire eyre, *RCR*, 1: 168-170.

<sup>161</sup> Masschaele, *Jury, State, and Society*, 205.

It is clear that considerable thought had been put into the design of the new Angevin legal procedures. The appearance of the litigants at court was carefully regulated, and efforts were made to ensure that cases progressed swiftly to judgment. However, the design of the new actions could do little to prevent delays caused by absent recognitors. Whilst actions brought in all the royal courts could suffer such postponements, cases heard at Westminster, or before the court *coram rege*, were by far the worst affected. In contrast, local hearings at the eyre suffered fewer postponements for lack of recognitors. It must be remembered, however, that eyres were only held intermittently. For long periods the Bench, and sometimes the court *coram rege*, were the only courts available to litigants. Furthermore, when eyres did occur, they were extremely busy. It was not uncommon for cases to be postponed to Westminster because they could not be concluded in the counties.<sup>162</sup> These cases might then be affected by the usual delays caused by absent recognitors at the Bench.<sup>163</sup>

Postponements caused by non-attendance of recognitors at the Bench and the court *coram rege* emphasised the desirability and convenience of local hearings. Attempts were indeed made to increase the provision of local justice as the thirteenth century progressed. Magna Carta stated that common pleas were not to follow the king, but were to be heard in a fixed place, and that possessory assizes such as *mort d'ancestor* and *novel disseisin* ought to be heard at first instance in their county of origin.<sup>164</sup> Justices were also ordered to visit the counties four times a year to hear

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<sup>162</sup> Hudson, *Oxford History*, 544.

<sup>163</sup> The plea roll containing records of the cases postponed from the 1202 East Anglian eyre and heard at Westminster highlights this problem. Only 11 cases proceeded to the recognition, and 14 were postponed because the recognitors were absent. See *PBJK*, 2: 226-341, cases proceeding to a recognition: nos. 780, 783, 784, 791, 801, 804, 811, 859, 868, 864, 921; cases postponed: nos. 771, 769, 813, 824, 846, 852, 855, 856, 866, 903, 910, 922, 943, 972.

<sup>164</sup> *Magna Carta* 1215, caps. 17 and 18.

assizes, although this was reduced to once a year in the 1217 reissue of the Charter.<sup>165</sup> These visitations failed to materialise, although other measures were put in place to allow a greater number of assizes to be heard in the counties. Most notably, a system of special commissions emerged, which allowed justices and county knights to hear individual assizes at specially convened local hearings.<sup>166</sup>

Nevertheless, these changes came about too late for the litigants of our period who brought their cases before the Bench or the court *coram rege*. The experience of many would have been similar to that of Richard de Anstey or the abbot of Abingdon, who we found in the early years of Henry's reign lamenting the numerous delays which plagued their cases. Furthermore, it is worth remembering that many litigants who brought their cases to these courts did so because they regarded the matter as too urgent to wait for the eyre.<sup>167</sup> In such instances the delays caused by absent recognitors would have been particularly frustrating. The Angevin reformers must have been dismayed to find their carefully regulated and streamlined procedures undermined time and again by the unwillingness of recognitors to fulfil their duties.

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<sup>165</sup> Ibid., 1215, cap. 18; *ibid.*, 1217, cap. 13.

<sup>166</sup> Meekings, *Surrey*, 66-67.

<sup>167</sup> Note the comments in Stenton, *English Justice*, 92.